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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. ~~1611~~ 70-137

F. D. RICH COMPANY, INCORPORATED, a corporation, doing business in the State of Washington, and AMERICAN SURETY COMPANY, *Petitioners,*

v.

THE UNITED STATES OF AMERICA FOR THE USE AND BENEFIT OF ACME GRANITE & TILE COMPANY, a Division of Piper & Greenhalgh, Inc., a Washington corporation,
Respondents and Cross-Petitioners

and

B & G CONSTRUCTORS, INCORPORATED; FIREMEN'S FUND INSURANCE COMPANY, and UNITED STATES FIDELITY & GUARANTY COMPANY.

On Cross-Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR CROSS-RESPONDENTS F. D. RICH COMPANY, INCORPORATED AND AMERICAN SURETY COMPANY IN OPPOSITION

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That opinion is printed in the Appendix hereto at pages 1a-2a and is not yet reported in the official reports.

JURISDICTION

Cross-respondents do not dispute cross-petitioner's jurisdictional statement except insofar as cross-petitioner invokes Rule 19 of the Supreme Court Rules as the basis for jurisdiction of this Court. Rule 19 of the Supreme Court Rules does not confer jurisdiction upon this Court to review a judgment by writ of certiorari but rather sets forth the considerations governing review on certiorari. Jurisdiction of this Court should have been invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether the Court of Appeals was correct in affirming the District Court's order granting cross-respondents' motion for new trial.

FEDERAL RULES INVOLVED

The question presented in the cross-petition involves Rules 50 and 59 of the Federal Rules of Civil Procedure. The pertinent portions of Rule 50 are as follows:

Rule 50. Motion for a Directed Verdict and for Judgment Notwithstanding the Verdict

* * *

(b) Motion for Judgment Notwithstanding the Verdict. Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Not later than 10 days after entry of judgment, a party who has moved

for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; . . . . A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative . . . .

(c) Same: Conditional Rulings on Grant of Motion.

(1) If the motion for judgment notwithstanding the verdict, provided for in subdivision (b) of this rule, is granted, the court shall also rule on the motion for a new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed, and shall specify the grounds for granting or denying the motion for the new trial. If the motion for a new trial is thus conditionally granted, the order thereon does not affect the finality of the judgment. In case the motion for a new trial has been conditionally granted and the judgment is reversed on appeal, the new trial shall proceed unless the appellate court has otherwise ordered. In case the motion for a new trial has been conditionally denied, the appellee on appeal may assert error in that denial; and if the judgment is reversed on appeal, subsequent proceedings shall be in accordance with the order of the appellate court.

The pertinent portion of Rule 59 is as follows:

Rule 59. New Trials; Amendment of Judgments

(a) *Grounds.* A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States; . . .

COUNTERSTATEMENT OF THE CASE

This action was instituted by Piper & Greenhalgh, Incorporated, a subcontractor on a federal defense housing project contract, for damages, and included sizable counterclaims and cross-claims by F. D. Rich Company, Incorporated (hereinafter Rich) and B & G Constructors, Incorporated (hereinafter B & G). It stems from contractual disputes experienced during construction of a 500-unit housing project for military personnel at Fort Lewis, Washington in 1962-1963. The general contractor, Rich, undertook with the United States to construct the project in 540 calendar days for $7,664,827.

The controversy centers on termination by Rich of its lathing, plastering and tiling subcontractor, Acme Granite & Tile Company, a division of Piper & Greenhalgh, Incorporated, following the latter's refusal to continue its work on the project. Piper & Greenhalgh, Incorporated's only claimed justification was its dissatisfaction with the condition of framing installed by B & G and its fear that the Corps of Engineers, which acted for the Government, might reject its work. Rich strove, without success, to pursuade Piper & Greenhalgh, Incorporated to return to work. Finally, Piper & Greenhalgh, Incorporated was terminated and Rich employed Sunset Tile Company to repair defects in Piper & Greenhalgh, Incorporated's work and to complete performance of the latter's unfinished work. Sunset completed the work promptly without major incident.

By agreement the issues of liability and damages were severed. Trial of the liability issues was to a jury. Cross-respondents moved for a directed verdict

at three stages of the trial, first at the close of the plaintiff's case, second at the close of the evidence, and third after the jury had been charged. The District Court expressed serious doubt as to whether any real fact issue existed:

> I think there are very serious questions concerning the merits of this motion, and we will have more time to consider it at a later time. (Liability Transcript 1599)

The District Court denied the motion for directed verdict and submitted the matter to the jury, subject to its later review. The jury returned a verdict in favor of Piper & Greenhalgh, Incorporated and against cross-respondents, B & G and B & G's surety.

Cross-respondents renewed their motion post-trial in the form of a motion for judgment notwithstanding the verdict and, in the alternative, moved for a new trial. The District Court directed that the testimony of all key witnesses be transcribed and called for briefs to be written in the same style as appellate briefs, with complete record references. With this perspective and after full argument, the District Court granted cross-respondents' motion for judgment notwithstanding the verdict and their alternative motion for new trial. He stated:

> At the conclusion of the evidence, the Court had grave doubts of the sufficiency of the evidence to sustain a negative answer by the jury to any one of the Sections 1(a), (b), and (c), 2 and 3 of the verdict form. Since the verdict, the transcribed evidence has been closely examined in the light of the controlling authorities and the applicable principles of law. The Court's doubt at the end of the evidence now has become a conviction.

> The Court finds and holds there was not a scintilla of evidence to support the jury's negative answer to the verdict sections referred to. Under the facts and circumstances shown without conflict in the evidence, affirmative answers to those sections were and are required as a matter of law. The evidence is clear and uncontradicted that Acme, without reasonable excuse or legal justification, refused to proceed with its contract work when directed to do so by Rich pursuant to valid and enforceable contract provisions. (Liability Transcript 1708-1709)

These conclusions were formalized in an order (Record 1442-1447) and ultimately were reflected in the judgment from which appeal was taken (Record 2620-2625). In the order granting the motion for new trial, the District Court stated:

> That the motion by Rich, American Surety Company, B & G, and United States Fidelity & Guaranty Company for new trial be and the same is hereby granted as against both Acme and Fireman's Fund, on the ground that the verdict and all of the jury's responses to special interrogatories were in all respects contrary to law and against the weight of the evidence. (Record 1446)

On Appeal to the Court of Appeals, Piper & Greenhalgh, Incorporated assigned error to the District Court's ruling granting a new trial. However, nowhere in either its opening brief or its reply brief did it even discuss the issue. The Court of Appeals, while reversing the judgment notwithstanding the verdict, affirmed the District Court's order granting the motion for new trial. It stated:

> A motion for a new trial is addressed to the sound discretion of the trial judge, and must be left standing by this court absent a showing of

abuse of discretion. *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 247 (1940); and see cases in 6A Moore, Federal Practice § 5908 (5), pp. 3814-3821 (2d ed. 1966). No showing has been made that the district court abused its discretion in granting the motion for new trial. Therefore, under established rules of appellate review, we remand this case to the district court for a second trial in accordance with the order granting the motion for new trial. (Appendix of Cross-Petitioner, pp. 7a-8a)

ARGUMENT

Cross-petitioner has completely failed to establish any reason why this Court should grant the cross-petition for writ of certiorari. The sole issue upon which cross-petitioner seeks review is whether the Court of Appeals departed from the accepted course of judicial proceedings, or sanctioned such departure by the District Court, in affirming the District Court's order granting cross-respondents' motion for new trial. However, cross-petitioner does not even summarize the proceedings in either the District Court or the Court of Appeals relating to that issue. It fails to point out that it did not even argue the issue in the Court of Appeals. Cross-petitioner does not even discuss the applicable court rules, Rules 50 and 59 of the Federal Rules of Civil Procedure. It is unable to cite any case even claimed to support its petition.

The only authority cited by cross-petitioner is Rule 19 of the Rules of the Supreme Court which sets forth the considerations governing review on writ of certiorari. Included as indicating the character of reasons which will be considered is:

> Where a court of appeals . . . has so far departed from the accepted and usual course of judicial pro-

> ceedings or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision.

The manner in which the Court of Appeals is contended to have sanctioned a departure by the District Court from the "accepted and usual course of judicial proceedings" is described by cross-petitioner as follows:

> May a trial court be so prejudiced against one of the litigants that he sets aside a jury's verdict in favor of that litigant and *then protects it* by summarily granting a new trial *only* in the event his judgment in favor of the other litigant is overruled?; not granting a new trial on any legal ground or because substantial justice was not done, but only if his judgment N.O.V. favoring the other litigant should be overturned? We are afraid this implies that if he is overruled, he wants another crack at it. (Italics included) (Cross-petition, p. 14)

That contention is unfounded.

In ruling on both the motion for judgment notwithstanding the verdict and motion for new trial, the District Court, rather than departing from the "accepted and usual course of judicial proceedings", was following the procedure specified in Rule 50(b) and (c) of the Federal Rules of Civil Procedure. Rule 50(c) provides that if a motion for judgment notwithstanding the verdict is granted,

> . . . the court shall also rule on the motion for a new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed, and shall specify the grounds for granting or denying the motion for the new trial. . . .

The procedure was approved by this Court in *Montgomery Ward & Co.* v. *Duncan,* 311 U.S. 243 (1940):

> If alternative prayers or motions are presented, as here, we hold that the trial judge should rule on the motion for judgment. Whatever his ruling thereon, he should also rule on the motion for a new trial, indicating the grounds of his decision. . . .

The District Court was, therefore, *required* to rule on the alternative motion for new trial. It did so rule, granting cross-respondents' motion on the ground that the verdict was "contrary to law and against the weight of the evidence." (Record 1446).

Nor did the Court of Appeals depart from the "accepted and usual course of judicial proceedings". On the contrary, it applied the established rules concerning appellate review of an order granting a new trial. The Court of Appeals cited this Court's decision in *United States* v. *Socony-Vacuum Oil Co.,* 310 U.S. 150, 247-248 (1940), where it was stated:

> Hence this case falls within the well established rule that neither this Court nor the Circuit Court of Appeals will review the action of a federal trial court in granting or denying a motion for a new trial for error of fact, since such action is a matter within the discretion of the trial court. Fairmount Glass Works v. Cub Fork Coal Co. 287 US 474, 77 L ed 439, 53 S Ct 252. Certain exceptions have been noted, such as instances where the trial court has "erroneously excluded from consideration matters which were appropriate to a decision on the motion." Fairmount Glass Works v. Cub Fork Coal Co. supra (287 US 483, 77 L ed 444, 53 S Ct 252). But there are no such circumstances here.
>
> * * *

> Certainly, denial of a motion for a new trial on the grounds that the verdict was against the weight of the evidence would not be subject to review. Moore v. United States, 150 US 57, 61, 62, 37 L ed 996, 998, 14 S Ct 26; J. W. Bishop Co. v. Shelhorse (CCA 4th) 141 F 643, 648; O'Donnell v. New York Transp. Co. (CCA 2d) 187 F 109, 110. In substance no more than that is involved here.

It also relied upon 6A Moore's Fed. Prac. (2nd Ed. 1966) 3814-21, § 59.08[5] where the rules governing appellate review are discussed at some length. Criteria for review are stated as follows at page 3820:

> What review, if any, may be had of the trial court's grant or denial of a motion for new trial on the ground that the verdict is against the weight of the evidence? None, as a general proposition; and this is in keeping with the usual principles that new trial rulings are, subject to certain narrow exceptions, non-reviewable. The motion for a new trial on the ground that the verdict is against the weight of the evidence is addressed to the sound discretion of the trial court. Unless the motion is not timely so that it has no power to act thereon, the trial court must exercise its discretion; and hence a failure so to do is reviewable. Accordingly, the grant or denial of the motion under the compulsion of a mistake of law is reviewable. But assuming that the court has the power to consider the motion and does exercise its discretion its error in granting or denying the motion, if any, is usually one of fact and non-reviewable. Under unusual or special circumstances the trial court's action may constitute an abuse of discretion and be reviewable, but rarely can this be shown.

The Court of Appeals held that no showing had been made that the District Court abused its discretion. That holding was clearly correct.

CONCLUSION

For the foregoing reasons, the cross-petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

[Filed April 8, 1971]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 23,744, 23,745, 23,752, 23,753

United States of America for the use of Acme Granite & Tile Company, a Division of Piper & Greenhalgh, Incorporated, a Washington corporation,
Appellant and Cross-Appellee,

v.

F. D. Rich Company, Incorporated, a corporation, doing business in the State of Washington; B & G Constructors, Incorporated,
Appellees and Cross-Appellants,
American Surety Company,
Appellee,
Fireman's Fund Insurance Company,
Appellant and Cross-Appellee,
and
United States Fidelity & Guaranty Company,
Appellee and Cross-Appellant.

Opinion on Petition for Rehearing

Before: Hamley and Wright, Circuit Judges and Goodwin, District Judge.*

Per Curiam:

In a petition for rehearing, F. D. Rich Company, Incorporated, urges that this court has erred in the application of state law.

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* The Honorable Alfred T. Goodwin, District Judge for the District of Oregon, sitting by designation.

As noted in our opinion of December 28, 1970, Washington law provided when the case was tried in the District Court that the dissolution of a corporation abated any action in which the dissolved corporation was a plaintiff. Washington law with reference to the rights of creditors and shareholders of dissolved corporations makes it clear, however, that even though a procedural rule formally abated a pending action in the state court, the rights of shareholders and creditors were not necessarily obliterated by the dissolution of the corporate entity. *Mayflower Realty Co.* v. *Security Savings & Loan Soc.*, 192 Wash. 129, 72 P.2d 1038 (1937); *State ex rel. Everett Trust & Savings Bank* v. *Pacific Waxed Paper Co.*, 22 Wash. 2d 844, 157 P.2d 707 (1945).

As noted in our opinion of December 28, 1970, the District Court was not bound by the procedural law of the State of Washington, but was bound by the Federal Rules of Civil Procedure. Under the Federal Rules, it is clear that the District Court had ample authority to dispose of the case on its merits by the substitution of parties if necessary.

There is no conflict between our opinion and the substantive law of the State of Washington. There is some federal case authority prior to 1938, when the Conformity Acts were still in force, which supports the petitioner's view that certain local procedural laws apply in the district court. See *Oklahoma Gas Co.* v. *Oklahoma*, 273 U.S. 257, 259-60 (1927) (dictum); *United States* v. *Spokane Mill Co.*, 206 F. 999 (1913). These cases have been rendered obsolete by the adoption of the Federal Rules of Civil Procedure.

We adhere to the views expressed in the original opinion. The petition for rehearing is denied.